No. 4412.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Navajo County,
Plaintiff in Error,

vs.

Louis F. Mesmer, an Individual, Doing Business Under the Firm Name and Style of Mesmer & Rice,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

GEORGE J. STONEMAN,
Attorney for Defendant in Error.

1209 Broadway Arcade Building,
Los Angeles, Cal.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

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The Errors Assigned May Not Competently Be Inquired Into.

May it please the court:

Upon the record presented in this court, as appears from the transcript of record in the particulars hereinafter referred to, it is suggested that the errors assigned may not competently be inquired into in that it appears, to quote the language used by this court in the case of Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310:

> "The writ of error in this case brings up for review a judgment in an action at law tried to the court without a jury, the judgment being based upon a general finding upon the evidence in favor of defendant (plaintiff) in the court below, the defendant in error here. A jury was dispensed with by consent of the parties expressed orally in open court, but no stipulation in writing evidencing the waiver was had or filed, and the assignments of error are all based upon rulings had at the trial."

It appears from the record:

(a) A jury was dispensed with by consent of the parties expressed orally in open court. [Tr. of R. pp. 83, 84, 107, 110.]

(b) The judgment was based upon a general finding upon the evidence in favor of plaintiff in the court below, the defendant in error here; no special findings were asked. [Tr. of R. pp. 191, 218.]

(c) The sufficiency of the amended complaint upon which this action was tried was not called in question by motion, demurrer or other procedure, nor even by answer thereto, nor did plaintiff in error, as defendant in the court below, elect to have its demurrer to the first complaint stand as demurrer to the amended complaint, in compliance with Rule 16, Rules of Practice of the District Court of Arizona, which reads as lollows:

> "Any party to an action at law or suit in equity, whose pleading is demurred to, may, as of course, at any time before the demurrer is heard, amend

such pleading, in the respects pointed out by the demurrer, or in any respect, without any order therefor; and the pleading so amended shall supersede and take the place of the pleading to which the demurrer was taken. The demurring party may put in a demurrer to the pleading as amended, or he may serve and file a notice that he elects to have his demurrer on file stand as a demurrer to the new pleading, in which case it shall be deemed and treated as such demurrer; or he may proceed with the cause without further demurrer."

First complaint in law. [Tr. of R. pp. 24-40, incl.] Motion to strike, plea in bar, demurrer, answer and motion to make definite and certain all as to first complaint. [Tr. of R. pp. 41-60, incl.] Amended complaint. [Tr. of R. pp. 62-80, incl.] No answer to amended complaint.

(d) The trial court had jurisdiction of the subject matter and parties and process was regularly issued and served and defendant in court below appeared and defended. [Tr. of R. pp. 21, 22, 23.]

(e) Judgment was regularly entered during term, no special findings having been asked. [Tr. of R. pp. 107, 191.]

(f) Motion for judgment. [Tr. of R. p. 104.]

Cannot take the place of request for special findings even though contents were sufficient, because not filed during the trial and before case was closed and submitted to trial court. Trial closed March 21, 1924. [Tr. of R. p. 95.]

Motion for judgment filed May 21, 1924. [Tr. of R. pp. 104 and 280.]

(g) In addition to the foregoing, it may be added that except as it may be determined to be an exercise of the discretionary power of the trial court, the granting of an extension of time for filing bill of exceptions is in contravention of Rule of Practice No. 82 of the District Court of Arizona, and by this rule upon the state of the record is null and void. The rule is as follows:

> "When an act to be done in any action at law or suit in equity which may at any time be pending in this court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extention by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, solicitor or counsel, or other person applying to the court or judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been ob-

tained from the adverse party or granted by the court or judge; and any extension obtained from the court or judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party."

Authorities in Support.

As to the procedure governing cases tried by the court without the intervention of a jury, under the provisions of section 700, R. S. U. S., as was expressed by the Circuit Court of Appeals of the 8th Circuit, Mason v. United States, 219 Fed. 547:

> "Section 700, Rev. Stat. U. S., provides as to what rulings in a case tried to a court, without a jury, may be reviewed by this court. This court has, with what might seem to be tiresome repetition, established rules for the guidance of counsel as to how these questions may be preserved and reviewed. Experience teaches that it would serve no useful purpose to repeat these rulings."

The rule having been established and because it would serve no useful purpose to set forth in this brief the hundreds of cases decided upon the rule as collected in the notes following section 700, appearing in Vol. 6, Fed. Stat. Ann., 2d Ed., p. 205 *et seq.*, defendant in error contents himself with citation only to the cases in which the question has arisen for de-

termination in this circuit and one or two other circuits.

In the case of *Erkel v. U. S.,* the opinion being written by Judge Gilbert, it was held:

> "Those sections (649 and 700, U. S. Comp. St. 1901, pp. 525, 570) provide that issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, that the finding of the court on the facts shall have the same effect as the verdict of a jury, and that, where a case is so tried, the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bill of exceptions, may be reviewed on writ of error, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. Under that statute it has been uniformly held that if a case is tried before the court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an appellate court on writs of error. Citing Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395; County of Madison v. Warren, 106 U. S. 622, 27 L. Ed. 311; Bond v. Dustin, 12 U. S. 604, 28 L. Ed. 835; Branch *et al.* v. Texas Lumber Co., 4 C. C. A. 52, 53 Fed. 849; Merrill v. Floyd, 3 C. C. A. 494, 53 Fed. 173; Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158; Ham v. Edgell, 45 C. C. A. 661, 106 Fed. 820; City of Defiance v. Schmidt, 59 C. C. A. 159, 123 Fed. 1."

In this case it was also decided that the rule of practice in the state courts providing that a jury is waived unless demand is made, does not govern in cases tried in the federal courts under the provisions of section 700.

Erkel v. U. S., 169 Fed. 623.

In *Ladd & Tilton Bank v. Lewis A. Hicks Co.*, 9th Cir., it is held that the statutes requiring that issues of fact in actions at law must be tried by a jury unless the jury be waived by stipulation in writing, when the facts may be tried by the court and its rulings reviewed as provided in section 700, are, so far as the right to review is concerned, jurisdictional, and in the absence of a compliance therewith, except the facts be admitted by the parties in a case stated, no question is open for review on errors other than "those arising upon the process, pleadings or judgment" (Citing Erkel v. U. S., 169 Fed. 623), and that where it appears from the record that no special findings were requested and no written stipulation waiving a jury appears from the records, this court is at liberty to consider only questions as to the sufficiency of the pleadings to sustain the judgment, it further appearing that the court had jurisdiction of the parties and the subject matter.

Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310.

In *Wear v. Imperial Window Glass Company*, 8th Cir., the case was tried by the court below without a jury and no request was made before the close of the

trial that the trial court find on special issues either of fact or law: Held:

> "But the case was tried by the court below without a jury and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, for any error of fact, and a finding of fact contrary to the weight of the evidence is an error of fact. (Rev. Statutes, par. 1011, U. S. Comp. St., par. 1672.) The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial." *Wear v. Imperial Window Glass Co.,* 244 Fed. 60, and cases cited therein.

> "Where a waiver of a jury trial is effected either by express oral consent or by personal at-

tendance upon the trial without objection, but without the filing of a written stipulation, rulings of the court upon the trial are not reviewable for such a submission to the decision of the court is not within the provisions of Rev. Stat., Secs. 649 and 700." Citing William Edwards Co. v. La Dow, 6th Cir., 230 Fed. 378.

"When the agreement waiving a jury is not in writing, the facts found cannot be noticed by the appellate court for any purpose." Rush v. Newman, 58 Fed. 158; Abraham v. Levy, 72 Fed. 124.

And

"The record must show that the stipulation in writing was made and the appellate court will scan the record closely to ascertain if the agreement referred to was in writing." Duncan v. Atchison etc., 9th Cir., 72 Fed. 808.

"A general finding upon a trial by the court without a jury has by the statute the same effect as the verdict of a jury. The parties are concluded upon the facts by the determination of the court, and nothing is presented for review except as might have been reviewed had there been a trial by jury," and "A general finding is conclusive upon all matters of fact precisely as the verdict of a jury." Streeter v. Chicago Sanitary Dist., 7th Cir., 123 Fed. 124.

And

"The review where the finding is general is limited to the sufficiency of the complaint and the ruling in the progress of the trial, if any be preserved, on questions of law."

> "Upon a general finding there is presented on appeal no question of the sufficiency of the facts found to support the judgment, and findings, whether they are general or special, have the effect of the verdict of a jury and are conclusive if there be any evidence to support them."

The foregoing principles are laid down in the hundreds of cases cited in the notes appearing on pages 213, 214 and 215, 6 Fed. St. Ann., 2d Ed., under section 700.

It is not urged as a ground for reversal in this case that there was no evidence to sustain the judgment, and even if this were true, where the case is submitted to the trial court without stipulation in writing waiving a jury, if plaintiff in error desired to raise any question of law upon the merits, in the court above, he should have requested special findings of fact by the court, framed like a special verdict of a jury, and then reserved his exceptions to those findings if he deemed them not to be sustained by any evidence. In this way, and in this way only, is it possible to review completely the action of the court below upon the merits. Humphreys v. Cincinnati Third National Bank, 6th Cir., 75 Fed. 852; Fales v. New York Life Insurance Company, 6th Cir., 98 Fed. 234; Phoenix Security Co. v. Dittinger, 9th Cir., 224 Fed. 892, 6 Fed. St. Ann., 2d Ed., pp. 221 and 222.

Motion for judgment filed on May 21, 1924 [Tr. of R. p. 104], the case having been submitted to the trial judge on March 21, 1924 [Tr. of R. p. 95], not having been filed during the trial of the case, comes too

late and cannot be urged as a substitute for a request for special findings in that such motion was not presented during the trial, nor was the ruling thereon secured during the trial. Wear v. Imperial Window Glass Co., 224 Fed. 60, and cases cited on page 63.

Answering Brief of Defendant in Error Upon the Case Presented Other Than as Above Set Forth.

Statement of the Case.

Early in June, 1916, the county of Navajo, state of Arizona, invited bids or proposals from contractors, in accordance with their call for bids and preliminary specifications prepared by Charles E. Perkins, county engineer, covering the construction of certain bridges, for the payment of which bonds in the sum of sixty-three thousand dollars ($63,000) had been authorized and sold. [Tr. of R. pp. 65, 208, 216.]

Defendant in error, Louis F. Mesmer, an individual doing business under the name and style of Mesmer & Rice, in response to such invitation, submitted a bid for the construction of a bridge over the Little Colorado near Winslow, designated in such call Bridge T-3. [Tr. of R. p. 65.]

Subsequently, after the different bids had been examined by the county engineer, the contract for the construction of Bridge T-3 was awarded to Mesmer & Rice, upon the proposals, specifications and plans

submitted, for the flat price of twenty-three thousand eight hundred dollars ($23,800), this award being made August 7, 1916. [Tr. of R. p. 67.]

On September 5th, a contract was entered into between defendant in error and the board of supervisors of Navajo county, containing the plans, specifications and proposal of Mesmer & Rice. [Tr. of R. pp. 6, 74.]

On or about August 9th, Mesmer learned that the Federal Government intended to contribute fifteen thousand dollars ($15,000) for the construction of the Winslow bridge. Until this time, it was understood that the bridge would be built in accordance with the specifications prepared by Charles E. Perkins, and upon which the plans were made and the bid of twenty-three thousand eight hundred dollars ($23,800) was based. The fifteen thousand dollars ($15,000), however, was available to the county only upon condition that the plans and specifications would meet with the approval of the Indian Department, and it became evident that there would necessarily be a change in the plans, particularly with regard to the substructure. [Tr. of R. p. 76.]

The award having been made, and it not being known at that time either to the county engineer, the board of supervisors or defendant in error, what changes might necessarily be made, and it being deemed inexpedient to re-advertise for bids, and it being also necessary that the plans should be changed, the county engineer, acting, as the evidence shows, by authority, and under the instructions of the board

of supervisors, and after consultation with the state engineer, prepared new plans, involving increased amounts and weights of structural and reinforcing steel, of excavation, of a much greater depth in the sinking of the piling, and a large amount of necessary extra concrete, to say nothing of extra labor. [Tr. of R. pp. 140, 170, 173, 174.]

With the knowledge that these changes would involve increased expense, and also, as before stated, with the knowledge that additional changes might be required to be made by the Indian Department, it was agreed that all changes necessitated through the modification of the original plans upon which the bid of Mesmer & Rice was submitted, and as incorporated in the contract of September 5th, should be paid for under the addenda for extras clause, incorporated in the original bid, which clause provided that:

Additional concrete in place should be paid for at the rate of $20.00 per yard.

Additional structural steel in place should be paid for at the rate of 7.5¢ per lb.

Additional reinforcing steel in place should be paid for at the rate of 7¢ per lb., and

All other work on a percentage basis, at actual cost, plus fifteen (15) per cent. [Tr. of R. pp. 140-166.]

After the work was commenced, estimates were made for payments due, and during the month of May, 1917, there arose for the first time a difference of opinion between Mesmer and the board of super-

visors, it being contended by the board that all extra work required by the modifications of the county engineer were included in the original price of twenty-three thousand eight hundred dollars ($23,800), and defendant in error contended that this extra work was to be paid for at the unit price, as per the addenda for extras included in the original proposal, specifications and plans, and as referred to in the contract. [Tr. of R. p. 136.]

In reliance upon his contract as understood by him, Mesmer nevertheless continued work upon the bridge, and in the month of November, 1917, presented to the board of supervisors a demand for the payment of seventeen thousand seven hundred and seventy-six dollars ($17,776), claimed to be due on the contract, and based upon charges made for extra work and material used in the construction of the bridge under the changed plans. The demand of November 5th being identified as Plaintiff's Exhibit 10.

On this date, the board of supervisors rejected the claim and there succeeded between that date and December 3rd following, a series of conferences between the board and Mesmer and his representative, which resulted in a meeting being held on December 3rd, at which time, throughout the whole day, the action of the board upon the demand of November 5th was the sole topic of discussion. The result was that the board admitted its liability for certain work performed at the request of the Commissioner of Indian Affairs, and its liability for payment of those items of the demand at the unit price, as per addenda for

extras mentioned in the contract, and in addition thereto, an amount sufficient to bring the total payments up to twenty-three thousand eight hundred dollars ($23,800).

It being apparent that no further sum would be allowed upon the November claim, Mesmer accepted the partial sum allowed, to-wit, the sum of six thousand two hundred four dollars and 62/100 ($6,204.62) as alleged, with the knowledge on the part of plaintiff in error that he was dissatisfied with such allowance, and with the reservation on his part of his right to sue for the further sum of fourteen thousand one hundred ninety-five dollars and 38/100 ($14,195.38), being the balance due him under and by the terms of the contract. [Tr. of R. pp. 140, 167.]

Upon consideration of the motions and demurrers interposed to the bill in equity, filed for the purpose of reforming the contract, this court remanded the suit to the law side of the court. The complaint was modified so as to meet the requirements of pleading on the law side. Demurrers and motions having been interposed, an amended complaint in law was thereafter filed, to which no demurrer or motion was interposed, and the issues in this suit were tried upon the amended complaint and the substitution for paragraphs 6 and 8 in the amended complaint of paragraphs designed to conform to the evidence adduced at the trial.

It is the contention of plaintiff that the action of the board of supervisors at the December meeting was to all intents and purposes a reconsideration of

its action in disallowing the November demand, at the November meeting, lacking only a minute entry made that the claim of November 5th was then being reconsidered, and that suit brought on May 31st was, and is, within the six months' limitation for this purpose as provided in section 2439, Revised Statutes of Arizona, 1913.

Argument on Authorities.

The sufficiency of the evidence to support the findings of fact not being involved in this appeal, it follows that the trial court has found in favor of defendant in error upon all of the facts contained in the foregoing statement, and there remains to be discussed, in the event this court shall entertain jurisdiction to examine any questions of law other than the sufficiency of the complaint and the regularity of the process, only the construction of the law applicable to the undisputed facts. For the convenience of this court there follows the paragraphs of the Revised Statutes of Arizona which bear upon the statutory questions of law involved:

PARAGRAPH 2434:

> "Every person having a claim against any county in this state, excepting those referred to in the provisions of this section, shall, within six months after the last item of the account accrues, present a demand therefor, in writing, to the board of supervisors of the county against which such claim or demand is held, verified by the affidavit of himself or agent, stating minutely what the claim is for, and specifying each sev-

eral item and the date and amount thereof; provided, that the board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued; that nothing herein shall be held to applv to the claims for compensation due to jurors and witnesses, and for official salaries, which, by some express provision of law, is made a demand against the county."

Paragraph 2435:

"No account shall be passed upon by the board unless made out as prescribed in the preceding section, and filed by the clerk at least one day prior to the session at which it is asked to be heard. All accounts so filed shall be considered and passed upon at the next regular session after the same are presented, unless for good cause the board shall postpone the same to a future meeting."

Paragraph 2439:

"A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment, the board must allow and pay the same, together with the costs adjudged, but if no more is re-

> covered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

It is in evidence that insofar as the demand of November 5th is concerned, it was filed within six months from the completion of the last work upon the bridge.

It is found as a question of fact, that the board of supervisors, at the meeting of December 3rd, reconsidered the claim and demand theretofore, on November 5th, filed with the board, so that the provisions of paragraph 2435 need not, we believe, be considered in connection with any of the controverted issues involved.

It is also found as a matter of fact, that the final action upon the demand of November 5th was taken by the board on December 3rd, 1917. Suit was filed on May 31st, 1918, and so within six months after such final action by the board of supervisors as required under the provisions of paragraph 2439, Revised Statutes of Arizona.

If the Demand Against Navajo County Is of a Character Requiring Itemization, and if the Demand Lacks Sufficient Itemization, the Board of Supervisors Has No Jurisdiction to Allow the Sum Claimed.

In Corpus Juris, Counties, paragraph 370, it is said:

> "The authorities are not in accord as to the effect of a decision of the county board, allowing or disallowing a claim against the county, especially as to the effect of such decision on other remedies for collection. In some jurisdictions it is held that the county board in passing on claims against the county, does not necessarily act in a judicial, but merely in an executive or ministerial capacity, as agents of the county, and that allowance of the claim, while *prima facie* evidence of its correctness, will not constitute an adjudication binding on the county." Citing Alabama, Indiana, Kansas, Missouri, North Carolina, Virginia, and West Virginia. "The weight of authority, however, is to the effect that a board of county commissioners, in the audit, adjustment, allowance or disallowance of a claim against the county, exercises judicial functions, and having exclusive jurisdiction, its judgment in the absence of fraud, is conclusive both on the board and on the parties interested, unless appealed from or reversed in the mode prescribed by law. * * * Under none of the cases holding as above cited, has it ever been held that the action of the board is final where the board allows claims illegal on their face or otherwise exceeds its jurisdiction. Corpus Juris, p. 370, cases cited."

The Claim or Demand Is Not Such a Demand as Requires Itemization.

The brief of plaintiff in error proceeds upon the assumption not only that the particular items going into the construction of the bridge should be set forth in detail, but that even if such items were so set forth, they could not be allowed and paid for as extras, because it does not appear that any of such so-called extras were ordered after the commencement of the construction work, and attempts to support the argument by insisting upon the inclusion of the words of the contract and proposal referring to the addenda, which reads:

"If after construction has started it becomes apparent that additional quantities are required, we hereby propose to furnish," etc.

Whatever may be said and whatever cases may be cited in support of the attempt on the part of plaintiff in error to prevent defendant in error from recovering upon the demand where every equitable consideration pleads for him, we believe the final determination of this question rests not upon the sufficiency of the itemization, but upon the question as to whether or not this demand is a claim which under the statute requires itemization. If this contract had been completed and accepted under the original proposal, plans and specifications or originally drafted at a flat or unit price of $23,800, upon which all except the sum of $6204.62 had been paid, and the demand on December 3rd had been presented for this amount

without reservation or exception and in full accord and satisfaction of all moneys then due, it would not, we confidently say, have been asserted by the board of supervisors that the items making up this amount should have been minutely set forth in the demand. Indeed, this is admitted by plaintiff in error through the payment by the board of supervisors of the sum of $6204.96, no part of the items making up this amount having ever been requested or even suggested by the board of supervisors. It is apparent that if this sum was paid as a portion of the total sum of $23,800, admitted to be due under the contract as construed by plaintiff in error, and if it is also claimed that this is a contract requiring itemization in order that the board of supervisors shall have jurisdiction to act upon its allowance, then the allowance of $6204.96 without itemization was an act in excess of its jurisdiction.

If the contract requires itemization as to those parts in excess of $23,800, the requirement is equally imperative that the items comprising the work up to this amount should be minutely set forth.

The board of supervisors contracted to pay defendant in error a fixed sum of money, that is to say, $23,800.00, for work performed under the original specifications. It is found by the trial court as a fact that the board of supervisors, through its county engineer, in collaboration with the contractor, and for the purpose of anticipating the requirements of the United States Indian Department, which requirements were on the 9th day of August, 1917, unknown, in-

creased the weight and thickness of steel cylinders, the yardage and cement foundation, the depth and strength of piles and other material changes in the substructure, which changes were agreed to be paid for at the unit prices covering extras as set forth in the original proposal and specifications. It is found as a fact, also, that even on August 9th, with the changes agreed to, it was not then known that additional changes would not be thereafter made necessary. The result was that the fixed sum of money originally agreed to be paid to the contractor was increased in a further fixed amount based upon known and determined weights, thickness and quantity of material to be used, all of which were to be paid for at a fixed and known price. It became and was a simple matter of computation and the amount involved was as well known at the time the new plans were agreed upon as at the time the structure was completed under the new plans. The contractor could not have charged for any more in weight or quantity than was required by these changes unless, indeed, additional changes had been authorized and required by the county at the suggestion or demand of its engineers or the engineers of the Indian Department. It was not a matter of computation as to the final aggregate amount of the weights and materials used, but only the computation as to what portion of the extra material and weights had been completed during each month, that is to say, there was substituted for the flat contract price of $23,800.00, a further contract price of materials agreed and understood to be

used, at the same unit prices as if the contract had been entered upon on the original specifications for $23,800.00, added to which there should have been required extras to be paid for under the terms of the proposal, the specifications and the contract itself at agreed and determined unit prices. The function of the board of supervisors in the making of any partial or final payments was confined to an ascertainment each month of what proportion of the work agreed to be performed had been completed and allowance on that part of the work completed based upon the contract price, plus such portion of the work as was agreed to be paid for as extras at the unit prices upon which such extras were agreed to be paid.

It is indeed a forced construction of the phrasing of this contract which permits plaintiff in error to argue that because no other additions were required by the Indian Department subsequent to those provided for prior to September 5th, the contractor should not be paid for those extras required before that date, but subsequent to the acceptance of the proposal, when the contract itself recites not only that the substructure was to be paid for at unit prices fixed for extras, but that all other extras thereafter ordered should be paid for on the same unit price basis.

It is a fact necessarily by the trial court found to have been proven that the amount for which claim was presented for allowance of November 5th, 1917, and the claim included in the demand presented on that day, and the action of the board taken on November 5th, was on December 3rd the sole topic of dis-

cussion between the contractor and the board of supervisors. The result of this discussion was that the amount of $6204.62, being a portion of the amount included in the November demand, was allowed, and for the purposes of this allowance a separate demand was required to be made out and filed. It is found that final action of the board of supervisors on the November demand was taken on December 3rd. This being determined as a fact, the plea in bar and of the Statute of Limitations was necessarily denied, the suit having been filed within six months from final action of the board of supervisors so had on December 3rd.

Authorities.

THIS IS NOT SUCH A DEMAND AS REQUIRES ITEMIZATION.

If the demand is based upon the contract substituting for the flat amount of $23,800.00 another fixed amount determinable by computation of the weight of extra steel used and the yardage of concrete filling, and if these weights and this yardage were known and agreed upon by both parties before the construction under the contract was commenced, as is the fact in this case, then such added and known amounts of money would be due under the contract itself and could be computed as easily by the engineer for the county, whose duty the evidence shows was to make such computations, as by the contractor himself. In other words, if a certain amount of money shall be due upon a contract, whether represented by an unpaid balance of the fixed amount or by an unpaid balance

of an equally fixed amount based upon the amount of additional steel and concrete used at fixed prices, the result is the same as to the obligation of the county to pay the agreed amount. This principle has been laid down and found support in the following cases:

In re Board of County Commissioners, Minn. 177 N. W. 1013.

Upon the facts stated, the county board had resolved to issue bonds to refund the floating indebtedness. One Meyers proposed to act as the agent of the county, in preparing and marketing the bonds, and in bearing certain further, other expenses connected therewith. As compensation for his services, he was to receive one-half of one per cent yearly, on the face of the bonds actually issued, not to exceed the sum of five thousand dollars ($5,000). A contract was entered into along these lines and suit being brought to recover, it was held:

> "Where a demand against the county is founded on an express contract for the payment of a fixed sum as compensation for services rendered, the county board has no discretion to exercise, but must allow and pay the stipulated compensation if the services have been performed. (Citing Werz v. County of Wright, Minn., 131 N. W. 635.) Myers presented a verified claim against the county, as provided by section 760, General Statutes, 1913, based on his contract with the county. It was not necessary to itemize it or set forth in detail his expenditures in performing the contract. If it was valid, he was entitled to the whole of the agreed compensation."

In the case at issue, there is, of course, no question of the right of the County of Navajo to enter into this contract.

In Merz v. Wright County, above cited, Minn., 131 N. W. 635, it is held:

> "The certificate of the engineer that the work had been completed and the contract performed, presented to the commissioners for approval, is not a claim within the meaning of that statute. The contractor's right to payment is founded upon the contract entered into with the county auditor, and the amount thereof is determined thereby, and by the number of yards of excavation, a matter of mathematical computation. The right of the contractor to compensation is in no manner within the control of the commissioners. That is determined by the contract, which the board cannot repudiate. The whole duty of the board, in this connection, is to determine, then, whether the contract has been performed, and perhaps, whether the certified yards of excavation is correct, if payment is by the contract, governed thereby."

This case is, we think, particularly applicable to the facts in the case at issue, in that the board of supervisors, as well as the Indian Department, had its supervising engineer in constant charge of, and inspecting the work as it progressed.

The county knew, from the original plans, the extent of the work originally contemplated. It knew the amount of extra work required by the Perkins plans. It knew the thickness of steel, increased as it was

from that in the original plans. It knew the extent of extra reinforcing steel, and the extra excavation and yards of concrete work. It knew the price at which all of this extra work and materials were to be furnished.

It even knew, as is in evidence, that portion of the extra work to be charged for at the agreed price, not only as allowed and paid for by the board of supervisors on December 3rd, but in the further sum of $1307.00. Indeed, the computation had already been made, and there remained for the board of supervisors only to allow that portion of the sum of $17,776 which had not theretofore been allowed, and paid.

In Quigg v. Monroe County, Wis., 113 N. W. 723, the following claim was presented for allowance:

> "The County of Monroe to C. E. Quigg, M. D., debtor:
>
> Nov. 21-22, 1905: To post mortem of the body of James De Corah, opening of abdominal thoracic and cranial cavities, also removing the cervical vertebrae from the body and preparing same for examination by order of the jurors and assistant district attorney.....$50.00"

Upon this claim an allowance was made of $10.00. From the decision of the board of supervisors an appeal was prosecuted. It was held that every claim or demand is not an account, although every account is a claim, and that the claim in question so presented was not such a claim as under the statute required to be itemized. More especially would this be

true if, as in the case at bar, the fee for post mortem examinations had by contract been fixed at the sum of $50.00.

See, also:

Bayne v. Board of Supervisors, Minn., 95 N. W. 456.

In this case a contract was let by the county for the construction of three bridges at the price of $1200.00. Upon completion of the bridges the contractor made his demand for payment of this sum as per the contract and his demand was verified under statute in all substantial respects similar to the statute of Arizona. Objection was raised to the payment upon the grounds, first, that the demand was not properly itemized; second, that it was such a contract as the board was without jurisdiction to enter into. The court held that where a fixed and determined price was agreed to be paid upon the completion of work, it would be futile and absolutely unnecessary to itemize the claim; that the board was concerned only in determining whether the contract had been fully completed; that such demand was a substantial, if not literal, compliance with the requirements of the statute. It was further held in this case as to the plea of lack of authority on the part of the board of supervisors to enter into such contract because for an amount in excess of that for which work could be contracted without calling for bids, that the authority of the board must be presumed, and this question being raised neither by the

pleadings nor the brief, it would not be considered on appeal.

The latter part of the opinion is applicable to the argument made in the brief by the plaintiff in error that the board of supervisors of Navajo county was without power or jurisdiction to act upon the November claim at its December meeting.

Further, upon the authority of the board to act upon the November claim at the December meeting, plaintiff in error having urged that final action was taken upon the November claim on the 5th of November, and that the board was without jurisdiction to consider this claim at the December meeting, it is suggested that if plaintiff in error shall be consistently technical, in view of the provision of the statute that claims shall be filed at least one day before the meeting, and that such claims so filed shall be acted upon at the next regular meeting, the board of supervisors was without jurisdiction to act upon the November claim until the December meeting, for it appears from the record that the claim was filed on the day of the November meeting and not at least one day preceding and was not, if a strict technical construction shall be urged as to this provision, empowered to act upon the claim until the next succeeding meeting, which was in December.

Respectfully submitted,

GEORGE J. STONEMAN,
Attorney for Defendant in Error.

1209 Broadway Arcade Building,
Los Angeles, Cal.